IN THE

Supreme Court of the United States

SEP 21 197

October Term, 1973
No. 73-344

HARVEY S. OWEN, individually and doing business as HARVEY'S GUEST HOUSE and JUNE CROWNOVER,

Petitioners,

vs.

JAMES A. MUSICK, in his capacity as Sheriff of the County of Orange, State of California,

Respondent.

Answer to Petition for Writ of Certiorari.

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Petitioners,

vs.

JAMES A. MUSICK, in his capacity as Sheriff of the County of Orange, State of California,

Respondent.

Answer to Petition for Writ of Certiorari.

Statement of the Case.

On November 21, 1969, a complaint for Declaratory Relief and injunction was filed by June Crownover, Harvey S. Owen, individually and doing business as Harvey's Guest House; Richard W. Carson and Robert A. Werner, partners doing business under the firm name of "Tuscan Room" also known as "Lil Annie's Room"; Samuel G. Mead and Roy Sikes, partners doing business under the firm name of "The Lamplighters" (hereinafter referred to as Real Parties) against James A. Musick in his capacity as Sheriff of Orange County, State of California, County of Orange and John Does, I through C inclusive (Case No. 170792).

The above complaint in its sailent parts alleges that Real Parties are all owners of places of business currently operating under on-sale licenses issued by the Department of Alcoholic Beverage Control, State of California, and presently presenting live entertainment to adult persons in the form of bare-breasted female dancers and nude dancers who perform on an elevated stage apart from the patrons in said establishment. It further alleges that Sections 318.5 and 318.6 of the California Penal Code and Ordinance No. 2356, Title 3, Division 11 of the Codified Ordinance of the County of Orange duly passed under authority of Sections 318.5 and 318.6 of the Penal Code are unconstitutional on their faces and as applied because they violate the First Amendment and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

On November 21, 1969, based on the above complaint and Declarations, the Superior Court of Orange County granted the temporary restraining order sought by the Petitioners, prohibited enforcement of the ordinance and ordered Respondent to appear on December 2, 1969, and show cause why a preliminary injunction should not issue.

On December 2, 1969, no evidence having been sought by or presented to the Court, the Court having read the points and authorities of both parties and heard oral arguments offered by all parties granted the preliminary injunction on the basis that both the statute and the ordinance are in violation of the equal protection clause of the Fourteenth Amendment . . . "(I)n that there is no reasonable, logical or factual basis for distinction wherein theaters, concert halls, or similar establishments should be exempted from the

restrictions imposed by said legislation while other establishments identical in nature, if not in name or designation, and the persons working therein, are made subject to the punishment provided by said legislation." (Min. Ord. of December 3, 1969.)

A Writ of Prohibition and a Petition for Hearing having been sought by Appellant and having been denied, an appeal followed. On June 18, 1971, the District Court of Appeals reversed the order of the Superior Court as to the waitresses but affirmed that portion of the order relating to dancers and entertainers. On May 1, 1973, the California Supreme Court reversed the order of the Superior Court and declared the Orange County ordinance and other similar ordinances to be valid. (See *Crownover v. Musick*, 9 Cal. 3d 405.)

Questions Presented.

1. Whether a state statute or ordinance prohibiting nude waitresses and/or entertainers performing in a public place violates the First Amendment of the United States Constitution.

2. Whether a state statute or ordinance prohibiting nude waitresses and or entertainers performing in any public place except in a "theater which is primarily devoted to theatrical performances violates the equal protection clause of the Constitution of the United States."

ARGUMENT.

I.

Neither the Statute nor the Ordinance Violate the First Amendment of the Constitution.

(a) Where the Statute Aims at Regulation Rather Than Suppression, the United States Supreme Court Has Decreed Valid the Restriction of Symbolic Speech as Contrasted With the Restriction of Pure Speech.

The statute and ordinance in question are not aimed at what is said but at what is done. They thus aim at regulation, not at suppression.

The power of the State to regulate conduct, even in the important area of free speech, has never been questioned. For example, advertising is a mode of expression, but *Railway Express Agency v. New York,* 336 U.S. 106, 93 L.Ed. 533, 69 S.Ct. 463 (1949), approved of an ordinance limiting advertising on public conveyances. The right to assemble is also a First Amendment right but *Feiner v. New York,* 340 U.S. 315, 95 L.Ed. 295, 71 S.Ct. 303, shows that the right cannot be freely indulged into in all places. The right to freely express and advocate opinion or ideas is at the very core of the First Amendment but *Kovacs v. Cooper,* 336 U.S. 77, 93 L.Ed. 513, 69 S.Ct. 448, clearly shows that the state may regulate by prohibiting the use of sound trucks.

In light of constitutional history, the regulatory power of the state is unquestionable as it is unquestionable that certain forms of expression (to wit political and religious) stand higher in the scale of importance than do other forms. (advertising or dancing for example). Reading of the statute and ordinance shows that what is here prohibited is the nakedness of certain parts of the

anatomy in places where food and beverages are served. Petitioner's hue and cry is that "Nudity per se is protected by the First Amendment."

Respondent submits that nudity *per se* is not protected by the First Amendment and becomes protected only when it is integral to an "expression" of some idea, *i.e.*, when it becomes an act of *symbolic speech. In re Giannini,* 69 Cal.2d 563, did not say, as has been contended, that *nudity* is a form of expression but that the dance is a form of expression and that nudity integral to it could not be suppressed when it is *integral* to it.

To elucidate further: a photograph depicting a dog is a form of expression and is protected, as are photographs depicting pigs, jackals or the naked female. But does it follow that *the* depicted dog, pigs, jackals and naked females are protected by the First Amendment? A naked marble statue is a form of expression, but is the marble protected before the work begins? Clearly not. Nudity, therefore, it not *per se* cloaked with First Amendment protection and is only entitled to protection when it is found in the context of a performance.

Even assuming the conduct here involved to be within the scope of a performance, the prohibition of the statute goes not to the performance itself but to the element of "nakedness" contained within the performance. But "nakedness" must be classed as "symbolic speech" not as speech proper and in recent years this Honorable Court has set a different test for the protection of "symbolic speech" than it has for speech proper. *United States v. O'Brien,* 391 U.S. 367, 376, 20 L.Ed. 2d 672, 88 S.Ct. 1673, sets forth the test. There this court refused to strike down a statute which prohibited the burning of draft cards and stated:

O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft."

We cannot accept the view that an apparently limitless variety of conduct can be labelled "speech" whenever the person engaging in the conduct intends thereby to express an idea . . . This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

In applyng the concepts set forth in *O'Brien,* the Court has upheld conduct which was *per se* innocuous while condemning conduct conducive to disruption.

Thus, for example, while declaring that the wearing of armbands by students was "symbolic free speech" within the protection of the First Amendment (See *Tinker v. Des Moines Independent Community School District,* 89 S.Ct. 733, 394 U.S. 11, 22 L.Ed. 2d 44) this court did not hesitate to allow regulation of similar conduct under circumstances where the conduct might be conducive to disruption (*Cf. e.g. Cox v. Louisiana,* 379 U.S. 536, 555, 13 L.Ed. 2d 471, 85 S.Ct. 453).

Moreover, it rarely has been suggested that constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute (*Cf. Giboney v. Empire Storage Co.,* 336 U.S. 490, 93 L.Ed. 834, 69 S.Ct. 684, and *Street v. New York,* 89 S.Ct. 1354, 394 U.S. 576, 22 L.Ed. 2d 572, where the court distinguishes between the "symbolic act" of burnng a flag and spoken words).

In another field involving far more important First Amendment rights than the one now under consideration this court in differentiating between absolute prohibition and regulation of conduct in *Cameron v. Johnson,* 390 U.S. 611, 617, 88 S.Ct. 1335, 1338-1339, 20 L.Ed. 2d 182 has stated:

> The argument centers on the fact that the prescription of the statute embraces picketing employed as a vehicle for constitutionally protected protest. But "picketing and parading [are] subject to regulation even though intertwined with

> expression and association," *Cox v. State of Louisiana,* 379 U.S. 559, 563, 85 S.Ct. 476, 480, 13 L.Ed. 2d 487, and this statute does not prohibit picketing so intertwined unless engaged in a manner which obstructs or unreasonably interferes with ingress or egress to or from the courthouse. Prohibition of conduct which has this effect does not abridge constitutional liberty "since such activity bears no necessary relationship to the freedom to * * * distribute information or opinion." *Schneider v. State,* 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155.

It is thus clear from the above that *conduct,* that is, symbolic speech can be *controlled* even if it cannot be suppressed. Accordingly, a state statute controlling conduct under certain circumstances does not run afoul of the First Amendment prohibition.

Where, as here, the element of "nakedness" does not seriously hinder "the marketplace of ideas" the statute cannot be struck down. The waitress is not less of a waitress and more of a performer because of lack of adequate clothing on her body. Nor is nudity a necessary attribute of the form of expression called go-go dancing. It is thus a separate adjective that can be separately prohibited without infringement on First Amendment rights. *Cameron v. Johnson,* 390 U.S. 611, 617, 88 S.Ct. 1335, 20 L.Ed. 2d 182 states:

> Prohibition of conduct which has this effect does not abridge constitutional liberty since such activity bears no necessary relationship to the freedom to distribute information or opinion.

As *United States v. O'Brien,* 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed. 2d 672 states:

> We cannot accept the view than an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea.

Additionally, Respondent submits that not only is the protection of nudity not proper First Amendment protection but also that the prohibition of nude appearances does not in any way "contract the spectrum of knowledge" (See *Martin v. City of Struders,* 319 U.S. 141, 87 L.Ed. 1313, 63 S.Ct. 862) so as to require First Amendment protection. As Justice Douglas has said in *Roth v. U.S.,* 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304:

> I assume there is nothing in the constitution which forbids congress from using its power over the mails to proscribe *conduct* on the ground of good morals. No one would suggest that the first amendment permits nudity in public places . . .

Accordingly, Respondent submits that a statute merely regulating such conduct by limiting it to certain places cannot be considered unconstitutional.

(b) Statutory Prohibition Against Nudity in Public Places Has Been Found Constitutional by This Honorable Court.

The case of *City of Portland v. Derrington* (Ore. 1968), 451 P.2d 111, 113, *cert. den.* November 17, 1969 involved a similar city ordinance, proscribing the exhibit of one or both female breasts in any public place where food or alcoholic beverage was offered for consumption. That court concluded:

> When nudity is employed as a sales promotion in bars and restaurants, nudity is conduct. As

> conduct, the nudity of employees is as fit a subject for governmental regulation as is the licensing of the liquor despensaries and the fixing of their closing hours. . . .
>
> The question is not one of legislative wisdom but one of constitutional power. The chief aim of the ordinance is to regulate conduct deemed by the lawmakers to be injurious to health, safety and morals. The city's legislative judgment in the matter should be upheld unless the statute unreasonably impinges upon those elements of communication which may be incidental to the regulated conduct. We do not believe the interference with communication in the case at bar has enough substance to present a First Amendment question.

The fact that a restriction upon the "commercial exploitation" of the nude or semi-nude female incidentally encompasses the costume worn by dancers does not make the restriction unconstitutional. It is not a restriction upon freedom of speech but rather a restriction placed upon commercial conduct to protect the best interests of the public.

In *State v. Brown,* 165 Ohio St. 31, 59 Ohio Ops. 45, 133 N.E.2d 333 at 335 (appeal dismissed 352 U.S. 884, 77 S.Ct. 126, 1 L.Ed. 2d 82), the court held valid a statute prohibiting nudist camps.

In *People v. Glassey,* unreported, Crim. A. 2256 (certiorari denied 332 U.S. 790, 68 S.Ct. 99, 92 L.Ed. 372, Oct. 29, 1947), the Appellate Department of the Superior Court of the County of Los Angeles held valid as against objections similar to those of the Real Parties in Interest, an ordinance of the City of Los Angeles prohibiting conducting any camp where three

or more persons not all of the same sex are permitted or allowed to commingle in the nude.

All the above cases this Honorable Court has refused to review. Pertinent is the statement in *United States v. Mussellshell State Bank*, 60 F.2d 157 at 159:

> While the denial of a writ of certiorari, . . . imports no expression of opinion upon the merits, it is a circumstance that may well have thoughtful consideration, in connection with other related questions.

Finally, Respondent submits that this case parallels that of *Hoffman v. Carson*, 250 So.2d 891, appeal dismissed by this Honorable Court on December 7, 1971, "for lack of a federal question." In that case the Florida Court considered and found constitutionally valid the application of an indecent statute to a naked beer bar dancer. In rejecting the defendant's claim of constitutional invalidity that court aptly stated at page 893:

> Appellant loses sight of the distinction between speech and conduct. The statute is not directed at First Amendment rights of free expression nor does it concern itself with obscenity as does Fla. Stat. Chapter 847, F.S.A. Rather, it is directed at the exposure of sexual organs and nudity, a matter of conduct thought to be a crime under the common law [*e.g. Commonwealth v. Broadland*, 315 Mass. 20, 51 N.E.2d 961 (1943); *Noblett v. Commonwealth*, 194 Va. 241, 72 S.E.2d 241 (1952)], and generally considered as having a reasonable relationship to the public welfare, and therefore, within the police power of the Legislature.

II.

Neither the State Statute nor the Orange County Ordinance Violate the Equal Protection Clause of the Fourteenth Amendment.

Since the statute and ordinance do not "suppress" but regulate behavior by restricting it to certain places, the statute or ordinance can only be struck down if unreasonable or arbitrary within the context of the due process or equal protection clauses of the Fourteenth Amendment.

In determining whether a statute or an ordinance constitutes a reasonable restriction within the due process clause of the Fourteenth Amendment, the Supreme Court of the United States has always balanced the interests of the various parties.

The amount of restriction that can be imposed depends on the State interest viewed in relation to the value of the conduct which the State seeks to limit and, as stated in *Cameron v. Johnson, supra,* on whether the conduct prohibited bears a true relationship to expression. In the case at bar, the statute prohibits nudity by performers and waitresses in a restaurant or bar. The value of such nudity to society is *de minimis* indeed, and its value as symbolic free speech under the circumstances is even more remote.

The State interest, on the other hand, is based on police and possibly health reasons.

The enabling statute here in question prohibits topless or bottomless waitresses or entertainers in any establishment which

> [S]erves food, beverages, or food and beverages, including but not limited to, alcoholic beverages, for consumption on the premises of such establishment.

The ordinance follows the enabling act almost verbatim. Both exclude from the prohibition a concert hall, theater or similar establishment which is *primarily* devoted to theatrical performances.

The statute has a presumption of validity, and the burden of proving its unreasonableness is on the Petitioners who have merely alleged unreasonableness and discrimination because they can find "no reason" for the classification. The statute, in fact, taken as a whole applies to all public places except those places which are primarily devoted to *theatrical* performances. Since a place devoted to a theatrical performance generally allows for no contact between the public and the performers who are on the stage, the differentiation is proper. Since it is indeed conceivable that where there is contact between the naked performers and the public, such contact might have been found to be conducive to disorderly conduct. Conversely, a place primarily devoted to the showing of theatrical performances normally having a fixed stage and greater distance between viewers and performers, could have been found to be less conducive to the creation of public disturbances.

Finally, given the statements made by this court in *Cameron* and *Tinker, supra,* and the very strong inference that only materials, *i.e.*, work products, are protected by the First Amendment, it is not unreasonable for the Legislature to limit the granting of First Amendment protection to nudity only when it is

within the context of a *theatrical* performance in a place devoted *primarily* to theatrical performances.

In *Rast v. Van Deman*, 240 U.S. 342 at 357, 36 S.Ct. 370, 60 L.Ed. 679 at 687, This Honorable court has stated:

> . . . It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and that the existence of that state of facts at the time the law was enacted must be assumed. . . . It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.

Richfield Oil Corporation v. Franchise Tax Board, 169 Cal.App.2d 331 at 336, 337 P.2d 237, quotes as follows from *Madden, Executor v. Kentucky*, 309 U.S. 83 at 88, 60 S.Ct. 406, 84 L.Ed. 2d 590 at 593, 125 A.L.R. 1383 at 1386:

> . . . The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it. In both cases, classification was the issue. Here, it must be presumed that the Legislature found that in a theatre, the performers are further away from the audience than in a bar or cafe and that, because of fixed seats and other reasons, contact between customers and performers was far less likely.

There is a far greater difference between a theatre and a place of business such as maintained by Petitioners than there is between a chicken ranch and a turkey ranch, yet a distinction between the latter two was held

valid in *Kelly v. Mahoney, supra,* 185 Cal.App.2d 799 at 805, 8 Cal.Rptr. 521, the court saying:

> The application of the above principles to the present case does not improperly classify turkey ranches or deny the respondent the equal protection of the law. The ordinance requires that turkey ranches in a designated zone shall have a cover crop or employ other dust control methods. The ordinance is uniform in its application. The prohibition applies to all turkey raising. The Board of Supervisors, the legislative body of the county, obviously was at liberty to consider the dust control problems in the raising of turkeys and legislate with reference thereto. The question of whether or not the chicken ranches created a sufficient problem to require the same restrictions as were applied to turkey ranches was a question of policy for the Board of Supervisors to decide, and the Court was not justified in holding that the classification was unreasonable. We believe that the Court in the instant case sought to exercise a discretion that was exclusively within the power of the Board of Supervisors.

Speaking of the power of the state to classify, *Morey v. Doud,* 354 U.S. 457, 1 L.Ed. 2d 1485, 77 S.Ct. 1344 at page 463 stated:

> 1) The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2) A classification

> having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79.

That case further points out that the equal protection clause of the Fourteenth Amendment "does not require that every state regulatory statute apply to all in the same business," (p. 465) and that the amendment "cannot be invoked to protect a business from the general hazards of competition."

In *Railway Express Agency v. New York*, 336 U.S. 106, 109, 93 L.Ed. 533, 69 S.Ct. 463, the court states:

> It is pointed out that the regulation draws the line between the advertisements of products sold by the owner of the truck and general advertisements. It is argued that unequal treatment on the basis of such a distinction is not justified by the aim and purpose of the regulation. It is said, for example, that one of appellant's trucks carrying the advertisement of a commercial house would not cause any greater distraction of pedestrians and vehicle drivers than if the commercial house carried the same advertisement on its own truck. Yet the regulation allows the latter to do what

> the former is forbidden from doing. It is therefore contended that the classification which the regulation makes has no relation to the traffic problem since a violation turns not on what kind of advertisements are carried on trucks but on whose trucks they are carried.

The court then concludes at page 110:

> We cannot say that judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection. It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. *Patsone v. Commonwealth of Pennsylvania,* 232 U.S. 138, 144. . . . And the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all. . . .

A look at the statute and ordinance in light of the above language shows that the statute and ordinance are not discriminatory. In effect, all the statute and ordinance do is to state that where the *primary* business is the presentation of theatrical performances, nakedness is allowed. Where food and drink are served and thus by inference where the entertainment is a secondary rather than a primary purpose, nakedness is not allowed.

By contrast, the affidavits attached to the answer to the complaint in this case show that in Orange County territory no single theater as described by the statute has either food, beer or liquor license for service inside the premises. And no arrests for lewd conduct have taken place there. Should a theater or other concert hall serve food or beer, its *primary* purpose would no longer be the production of theatrical performances, and the theater or concert hall would then come within the prohibition of the statute.

Respondent thus submits that for Petitioners to claim discriminatory classification under the statute has no more merit than if the theaters were to be here complaining of discriminatory classification because they are not given a beer or liquor license.

Other arguments presented by Petitioners attempting to apply the *Miller v. California*, ... U.S. ...., ... S.Ct. .... (June 21, 1973) rationale to the case at hand are frivolous since as shown above the ordinance is aimed at *nudity*, not at obscenity. *California v. LaRue*, 34 L.Ed. 2d 365, 93 S.Ct. 368, 409 U.S. 109, is also not here applicable since as the *Crownover* opinion points out at note 15:

> The only language in the opinion potentially applicable to the instant matter involved *regulation of motion pictures as well as live entertainment* and thus is distinguishable since the ordinances herein do not regulate motion pictures.

Conclusion.

For all the reasons above stated Respondent respectfully urges this Honorable Court to deny the Petition for Certiorari.

Dated this 20th day of September 1973.

Respectfully submitted,

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